

February 26, 2010

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker  
Clerk of Court

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NEYEMBO MIKANDA,

Petitioner - Appellant,

v.

PAUL A. KASTNER, Warden,

Respondent - Appellee.

No. 10-6033  
(D.C. No. 5:09-CV-00903-HE)

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**ORDER**

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Before **HARTZ, O'BRIEN**, and **GORSUCH**, Circuit Judges.

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On December 30, 2009, a United States Magistrate Judge filed his supplemental report and recommendation that Neyembo Mikanda's 28 U.S.C. § 2241 petition be dismissed without prejudice to the filing of a 28 U.S.C. § 2255 motion in United States District Court for the District of New Jersey where Petitioner was convicted and sentenced. Petitioner Mikanda, a federal prisoner proceeding *pro se*, filed a notice of appeal. We dismiss for lack of jurisdiction. The magistrate judge's supplemental report and recommendation is interlocutory.

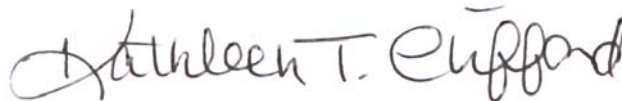
Except for proceedings conducted by a magistrate judge upon designation by a district judge and consent of the parties pursuant to 28 U.S.C. § 636(c), decisions rendered by a

magistrate judge are not final or immediately appealable. “[W]e have consistently recognized that ‘[a] magistrate exercising “additional duties” jurisdiction remains constantly subject to the inherent supervisory power of the district judge and the judge retains the “ultimate responsibility for decision making in every instance.”’ *Colorado Bldg. & Const. Trades Council v. B. B. Andersen Const. Co.*, 879 F.2d 809, 811 (10th Cir. 1989) (citations omitted). *Accord Lister v. Dep’t of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005).

In the underlying habeas proceeding, the parties did not consent to final disposition by a magistrate judge under § 636(c), and the district judge has not entered final judgment. Consequently, the magistrate judge’s December 30, 2009 supplemental report and recommendation does not constitute a final or immediately appealable decision under 28 U.S.C. § 1291 or under any recognized exception to the final judgment rule.

The appeal is **DISMISSED** for lack of appellate jurisdiction.

Entered for the Court,  
Elisabeth A. Shumaker, Clerk

A handwritten signature in dark ink, reading "Kathleen T. Clifford". The signature is written in a cursive, flowing style.

Kathleen T. Clifford  
Attorney - Deputy Clerk